IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 137

FRANK WOLF,
Petitioner and Appellant below,
vs.
B. C. SCHRAM, Receiver of First National Bank - Detroit,
Respondent and Appellee below

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The petition for writ of certiorari should be denied. It amounts to nothing more than a plain attempt to relitigate, *on the same record,* a decision *in a class action,* rendered April 9, 1934, by the United States District Court for the Eastern District of Michigan, Southern Division. *Barbour v. Thomas,* 7 Fed. Supp. 271. This was affirmed without

dissent by the United States Circuit Court of Appeals for the Sixth Circuit in two opinions. *Barbour v. Thomas* (1936), 86 Fed. (2d) 510; *Ullrich v. Thomas* (1936), 86 Fed. (2d) 678. As to this decision, this Court has already twice denied certiorari. *Barbour v. Thomas* (1937), 300 U. S. 670; *Ullrich v. Thomas* (1937), 301 U. S. 692.

In the *Barbour* and *Ullrich* cases above cited, it was decided that the stockholders of Detroit Bankers Company, a bank stock holding corporation, were liable for their proportionate part of the national bank assessment levied by the Comptroller of the Currency of the United States on the shares of the insolvent First National Bank-Detroit. In the instant case, the Receiver of First National Bank-Detroit brought suit against the petitioner, Frank Wolf, to recover his proportionate part of said national bank stock assessment, based upon his admitted ownership of Detroit Bankers shares.

First National Bank-Detroit failed February 11, 1933. Its liabilities were over four hundred million dollars, upon which at this date dividends of only eighty percent have been paid. Its capital was twenty-five million dollars and on this capital the Comptroller of the Currency, on May 11, 1933, levied an assessment of one hundred percent, payable July 31, 1933.

All the capital stock of First National Bank-Detroit, except directors qualifying shares, stood in the name of a bank stock holding company, Detroit Bankers Company, which, hopelessly insolvent, failed at the same time that the bank failed. Since nothing on account of the First National stock assessment could be collected from the defunct holding company, the bank Receiver promptly demanded payment proportionately from the stockholders of the holding company.

The holding company had been formed by exchanging bank shares for holding company shares. No cash or other capital had been paid into the holding company. Its only assets were the bank stocks for which it exchanged its own shares. Referred to on the face of each holding company stock certificate and printed in full in bold type on the back thereof was the following excerpt from the articles of association (article IX-A) of the holding company (R. 7):

> "The holder of each share of Common Stock of this corporation shall be individually and severally liable for such stockholder's ratable and proportionate part (determined on the basis of their respective stockholdings of the total issued and outstanding stock of this corporation) for any statutory liability imposed upon this corporation by reason of its ownership of shares of capital stock of any bank or trust company, and the stockholders of this company—by the acceptance of their certificates of stock of this company—severally agree that such liability may be enforced in the same manner and to the same extent as statutory liability may now or hereafter be enforceable against stockholders of banks or trust companies under the laws under which said banks or trust companies are organized or operate. A list of the stockholders of this company shall be filed with the Banking Commissioner of Michigan or the Comptroller of the Currency, whenever requested by either of those officers."

Before the bank assessment above referred to was due, approximately four hundred holding company stockholders, as complainants and interveners, with a combined assessment liability of about four million dollars, filed as a test case a class action in equity on behalf of themselves and all other holding company stockholders, in the United States District Court at Detroit, to enjoin the bank Receiver from making any attempt at law or otherwise to collect the assessment from the holding company stockholders. In such

class suit an interlocutory injunction was granted on the filing of the bill, July 12, 1933, in favor of all the holding company stockholders, whether they were actual parties to the suit or not. This interlocutory injunction continued in force to the advantage of the petitioner Wolf, as well as all other holding company stockholders, until the case was tried and decided on its merits. The bank Receiver, in addition to an answer, filed a cross-petition affirmatively seeking judgment against each holding company stockholder who was a party to the case. Honorable Johnson J. Hayes, United States District Judge for the Middle District of North Carolina, was designated by the Honorable Chief Justice of this Court to try the case. The trial lasted many weeks. The record, as condensed and printed on appeal, consisted of 13 volumes comprising approximately 5800 pages. Throughout the trial both sides considered the case as a class suit and as a test case to determine as to all holding company stockholders whether or not they were proportionately liable for the First National Bank-Detroit assessment. Judge Hayes held that they were liable to the bank Receiver, made elaborate findings of fact and conclusions of law, wrote an excellent and full opinion, and entered a final decree accordingly. *Barbour v. Thomas* (1934), 7 Fed. Supp. 271.

The holding company stockholders promptly perfected an appeal to the United States Circuit Court of Appeals for the Sixth Circuit. The receiver of the holding company, also a party defendant below, took a cross-appeal. One of the holding company stockholders, a named party in that case and represented by the same counsel now appearing for petitioner here, took an independent appeal. The United States Circuit Court of Appeals affirmed the District Court on the main appeal and on the cross-appeal, *Barbour v. Thomas* (1936), 86 Fed. (2d) 510; and also affirmed the District Court on the independent appeal.

Ullrich v. Thomas (1936), 86 Fed. (2d) 678. On the main and cross-appeals, petitions for certiorari were denied by this Court. *Barbour v. Thomas* (1937), 300 U. S. 670. On the independent appeal a separate petition for certiorari was also denied by this Court. *Ullrich v. Thomas* (1937), 301 U. S. 692.

All of the 8,000 holding company stockholders, except petitioner Frank Wolf and a handful of others represented by the same counsel, have recognized the finality of the decisions in the *Barbour* and *Ullrich* cases. The decisions of the District Court and the Court of Appeals in these two cases have been cited with approval many times. *Adams v. Nagle* (1938), 303 U. S. 532, 541; *MacPherson v. Schram* (C. C. A. 5, 1940), 112 Fed. (2d) 674, 675; *Gillespie v. Schram* (C. C. A. 6, 1939), 108 Fed. (2d) 39, 41; *Munro v. Post* (C. C. A. 2, 1939), 102 Fed. (2d) 686, 687; *Smith v. Witherow* (C. C. A. 3, 1939), 102 Fed. (2d) 638, 643; *Commissioner of Internal Revenue v. Carey-Reed Co.* (C. C. A. 6, 1939), 101 Fed. (2d) 602, 604; *Schram v. Leyda* (C. C. A. 9, 1938), 97 Fed. (2d) 665; *Schram v. Smith* (C. C. A. 9, 1938), 97 Fed. (2d) 662; *Schram v. Poole* (C. C. A. 9, 1938), 97 Fed. (2d) 566, 569; *Erickson v. Slomer* (C. C. A. 7, 1938), 94 Fed. (2d) 437, 439; *Nettles v. Rhett* (C. C. A. 4, 1938), 94 Fed. (2d) 42, 47, 48; *Moss v. Furlong* (C. C. A. 6, 1937), 93 Fed. (2d) 182, 183; *Church v. Hubbard* (C. C. A. 6, 1937), 91 Fed. (2d) 406, 408; *Union Guardian Trust Co. v. Schram* (C. C. A. 6, 1937), 86 Fed. (2d) 1015; *Erickson v. Richardson* (C. C. A. 9, 1936), 86 Fed. (2d) 963, 966; *Atherton v. Anderson* (C. C. A. 6, 1936), 86 Fed. (2d) 518, 534; *Schram v. Collins* (D. C. Mich. 1939), 30 Fed. Supp. 783, 784; *Anderson v. Abbott* (D. C. Ky. 1938), 23 Fed. Supp. 265, 268, 271; *Anderson v. Atkinson* (D. C. Ill. 1938), 22 Fed. Supp. 853, 862; *Powell v. Malone* (D. C., N. C., 1938), 22 Fed. Supp. 300, 302; *Gerber v. Gossweyler* (D. C., N. Y., 1937), 18 Fed. Supp. 925, 927; *Drake v. Dilatush* (D. C. Ill. 1936),

16 Fed. Supp. 120, 123; *Hanley v. Corwin* (D. C., N. Y., 1936), 15 Fed. Supp. 396, 397; *Pottorff v. Dean* (D. C. Mass. 1934), 8 Fed. Supp. 670, 672; *Schram v. Keane* (1938), 279 N. Y. 227, 231, 18 N. E. (2d) 136, 138; *Hanson v. Agnew* (1938), 195 Wash. 354, 369, 80 Pac. (2d) 845, 852; *Burrow v. Emery* (1938), 285 Mich. 86, 96, 280 N. W. 120, 123; *White v. Aaronson* (1938), 169 Misc. (N. Y.) 593, 594, 7 N. Y. S. (2d) 901, 902.

Notwithstanding the *Barbour* and *Ullrich* cases, petitioner Wolf persisted in his refusal to pay the assessment. The bank Receiver then brought the instant suit against him. The bill of complaint was substantially identical to the Receiver's cross-bill in the *Barbour* case. All of the facts alleged in the complaint were admitted by answer (R. 14), or in the stipulation of facts (R. 18). The stipulation provides that the "facts as found" in *Barbour v. Thomas* "are part of the facts in this case" (R. 20).

COMMENT ON "REASONS RELIED ON FOR ALLOWANCE OF WRIT"

I. Under the above caption the petitioner, at page 5 of his brief, states that the Circuit Court of Appeals declined to pass upon the merits of his appeal. This statement is unwarranted. Because the case was conceded to be identical to *Barbour v. Thomas* (D. C. Mich. 1934), 7 Fed. Supp. 271; (C. C. A. 6, 1937) 86 Fed. (2d) 510; cert. den. 300 U. S. 670; and on the same record, a *per curiam* opinion was handed down. *Wolf v. Schram*, 111 Fed. (2d) 146 (R. 94). This does not mean, however, that the appeal was not decided on its merits. The case was not disposed of on a summary motion. It was thoroughly briefed and fully argued and decided on the merits.

A belated attempt to differentiate the *Wolf* case from the *Barbour* and *Ullrich* cases was made by counsel for Wolf, after the District Court decision had been announced, by filing a motion to make the Comptroller of the Currency a party. This motion was denied and from the denial no appeal was taken. A casual reading of the motion (R. 28) will disclose that it is without merit. It is simply an indirect method of attempting to defend a stock assessment suit by making a collateral attack on the assessment itself.

II. If we assume that petitioner did appeal from the District Court order denying his motion to make the Comptroller of the Currency a party, there is no error in the judgment of the Circuit Court of Appeals because it is elementary that the Comptroller of the Currency is not a necessary or proper party to a suit brought by a national bank receiver against a national bank stockholder for the recovery of a stock assessment. 12 U. S. C. A., sec. 192; *Richmond v. Irons* (1887), 121 U. S. 27, 49. It was certainly not necessary to make the Comptroller of the Currency a party in order to plead the statute of limitations. It is equally clear that the collateral attack on the necessity for the assessment cannot be pleaded as a defense to a stock assessment suit. *Adams v. Nagle* (1938), 303 U. S. 532; *Forrest v. Jack* (1935), 294 U. S. 158; *Kennedy v. Gibson* (1869), 8 Wall. 498.

III. It is claimed that petitioner was denied the right to plead the Michigan three-year statute of limitations. It is obvious that the three-year statute of limitations does not apply. The appropriate Michigan statute, Section 13976, Compiled Laws of Michigan, 1929, reads:

> "All actions in any of the courts of this state shall be commenced within six years next after the cause of action shall accrue, and not afterward, except as hereinafter specified."

It is conceded that the suit was brought well within six years. One of the exceptions, and the one relied on to the above quoted general statute, reads:

> "Actions to recover *damages for injuries to person or property* shall be brought within three years from the time said actions accrue, and not afterwards." (Italics ours.)

How anyone could seriously contend that a national bank receiver's suit to collect a liability imposed by a federal statute upon the bank stockholder is an action "to recover damages for injuries to person or property" is difficult to understand. The Receiver's petition makes no claim for damages to his "person or property," which means, as is obvious, a tort claim arising from physical injury to a person or to his specific property. *Sweet v. Sweet* (1933), 262 Mich. 432, 247 N. W. 711. The Receiver is asking the bank stockholder to pay a liability imposed by statute and which, in addition, arises *ex contractu* by reason of the articles of association of the holding company, heretofore quoted.

IV, V. Reasons relied on numbered IV and V set forth the same subject matter contained in reasons I, II and III. The pleadings and proceedings in the District Court below plainly show that the case was tried on the ground of *res adjudicata* and on the claim that the bank is now solvent, and also plainly show that there was not any intimation of the defense of the statute of limitations. After the District Court had decided the case and handed down its findings of fact and conclusions of law in favor of the Receiver, petitioner then sought permission to make the Comptroller of the Currency a party, with leave to file an injunction against him, in which reference was first made to a possible defense of the statute of limitations. No appeal was taken to the court's action in this respect, and in the brief in the

Circuit Court of Appeals petitioner did not even contend that the District Court erred in denying the motion to make the Comptroller a party. The argument was tardily presented in a reply brief, and in a supplemental reply brief, filed after the argument.

The case of petitioner, including the tardily presented idea of the statute of limitations as a defense, is founded solely upon the claim that the Receiver now has sufficient assets to pay the depositors of the bank in full. This claim is gleaned from an estimate as to what future liquidation of the First National Bank-Detroit assets may produce, including further stock assessment collections. The claimed solvency of First National Bank-Detroit as a defense to the stock assessment in question was raised and disposed of in the *Barbour v. Thomas, supra,* litigation. Further, this Court has often refused to give any validity to any assessment defense resting upon an alleged excess of assets over liabilities. *Casey v. Galli* (1877), 94 U. S. 67; *Adams v. Nagle* (1938), 303 U. S. 532.

Such question as petitioner attempts to inject into this case with regard to the decision in *Backus v. Connolly* (1934), 268 Mich. 495, 256 N. W. 496, was similarly raised in the Sixth Circuit Court of Appeals by petitioner's and the other counsel who participated in the *Barbour* and *Ullrich* cases. It was clearly and completely disposed of there. *Barbour v. Thomas* (C. C. A. 6, 1936), 86 Fed. (2d) 510, 517 [cert. den., 300 U. S. 670].

CONCLUSION

It was decided in the *Barbour* and *Ullrich* cases that the holders of Detroit Bankers stock were each liable for their proportionate part of the First National Bank stock assessment. These decisions were rendered upon complete pleadings, a full trial and a complete and extensive record. Petitioner now asks this Court, after it has twice denied certiorari and after the holding company stockholders have paid approximately twenty million dollars on account of the assessment, to reverse in principle the *Barbour* and *Ullrich* decisions on substantially the identical, though abbreviated record, in these previous cases. As a defense he seeks to utilize the twenty million dollars that his fellow stockholders have paid to the bank Receiver in order to substantiate his claim that the bank is now solvent. He disregards the fact that it was declared insolvent by the Comptroller of the Currency more than seven years ago, and that even to this date the depositors have only been paid eighty percent on their claims.

Respectfully submitted,

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